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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

JOE MENDOZA,

Plaintiff and Appellant,

v.

JOHN G. LANE et al.,

Defendants and Respondents.

D043373

(Super. Ct. No. GIC749778)

ORDER DENYING PETITION FOR
REHEARING AND MODIFICATION
OF OPINION

[NO CHANGE IN JUDGMENT]

THE COURT:

The opinion filed November 17, 2004 is modified as follows:

On page 6, line 17, after the sentence ending with the words "amended complaint."

delete the parenthetical case citation and description and replace it with the following:

"Although Mendoza contends that the court's denial of the first set of motions for summary judgment without prejudice was in fact a determination that one or more triable issues of fact existed, he is mistaken. If the court had found such triable issues, it was required to identify those issues and the evidence supporting them (§ 437c, subd. (g)) and yet the court's ruling on the first set of summary judgment motions did not identify any such issues or evidence. Further, the court's denial of the motions was not based on the defendants' failure to meet their initial burden to establish their

entitlement to summary judgment. (Compare *Bagley v. TRW, Inc.* (1999) 73 Cal.App.4th 1092, 1097 [holding that the denial of a motion for summary judgment "without prejudice" was sufficient to trigger the application of section 437c(f)(2) where the court specified that the ruling was based on the insufficiency of the defendant's arguments or evidence to establish their entitlement to summary judgment]).) The record thus shows that the denial of the first set of motions for summary judgment was not based on the merits."

The petition for rehearing is denied.

[No change in judgment.]

NARES, Acting P. J.

Copies to: All parties